15,569

153-684

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1185.

JOHN Y. McKANE, APPELLANT,

vs.

F. H. DURSTON, AGENT AND WARDEN OF SING SING PRISON, IN THE STATE OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 7, 1894.

(15,569.)

(15,569.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1185.

JOHN Y. McKANE, APPELLANT,

vs.

F. H. DURSTON, AGENT AND WARDEN OF SING SING PRISON, IN THE STATE OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Petition for writ of *habeas corpus*	1	1
Order refusing writ	8	4
Assignment of errors	10	4
Bond	11	5
Petition of appeal	14	6
Admission of service	17	7
Affidavit of service	18	8
Citation	20	9
Clerk's certificate	22	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 10, 1894.

1 U. S. Circuit Court, Southern District of New York.

JOHN Y. MCKANE
against
F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York.

To the judges of the circuit court of the United States for the southern district of New York:

The petition of John Y. McKane, by Robert H. Griffin, his attorney, respectfully showeth unto your honors that he is unlawfully imprisoned and restrained of his liberty, contrary to law and in violation of the Constitution of the United States, by F. H. Durston, as agent and warden of the State prison of the State of New York, at Sing Sing, in the southern district of New York, the violations of the Constitution of the United States charged being, amongst others, that he is so unlawfully imprisoned and restrained of his liberty contrary to law and in violation of section II, article IV, of the said Constitution, which reads as follows:

"Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

2 And in violation of article V of the articles in addition to and amendment of the said Constitution; which said article, amongst other things, reads as follows:

"No person shall be * * * deprived of life, liberty, or property without due process of law." * * *

The facts concerning the detention of your petitioner and the claim or authority by virtue of which he is so detained are as follows:

First. That on or about the 19th day of February, 1894, a judgment was rendered against the said John Y. McKane by a court of oyer and terminer held in and for the county of Kings, in the State of New York, upon a trial upon an indictment charging him with wilfully violating a provision of the election law relative to the registration of electors in words as follows, to wit:

"Whereupon it is ordered and adjudged by the court that the said John Y. McKane, for the felony aforesaid, whereof he is convicted, be imprisoned in the State prison at Sing Sing at hard labor for the term of six years."

Second. That upon this judgment of conviction an order was entered by said court of oyer and terminer reading as follows:

"Ordered by the court that the sheriff of the county of Kings take the body of the above-named defendant, John Y. McKane, and him safely convey to the State prison at Sing Sing forthwith and alone."

3 And that thereupon and thereafter and by virtue thereof the said John Y. McKane was by the sheriff of the county of Kings taken to the State prison of the State of New York at Sing Sing and therein imprisoned, confined, and deprived of his liberty by F. H. Durston, agent and warden of said State prison,

where he now is so confined, imprisoned, and deprived of his liberty, and where he has been so confined, imprisoned, and deprived of his liberty as aforesaid.

Third. That, as your petitioner is informed and believes, said judgment of conviction and said order of commitment are absolutely void; wherefore and whereby your petitioner, John Y. McKane, is deprived of his liberty as aforesaid without due process of law and in violation of article V of the amendments to the Constitution of the United States above quoted.

Fourth. That after the rendition of the aforesaid judgment of conviction and the entry of the aforesaid order your petitioner, being denied the right of bail, was conveyed to Sing Sing prison, where he now is; wherefore and whereby your petitioner says that the judgment, sentence, commitment, and order aforesaid in this case are and each of them is void under the Constitution of the United States.

Fifth. That from the said judgment and conviction your petitioner has duly taken and was allowed an appeal to the general term of the supreme court of the State of New York, held in
4 and for the second department of the said court, the court having jurisdiction of the said appeal, and that the said appeal is now there pending wholly undetermined; and that notwithstanding the taking of the said appeal and the granting and allowance thereof, the said F. H. Durston continues to detain and confine your petitioner in the State prison of New York, at Sing Sing, at hard labor, and threatens to continue so to do, and that notwithstanding the taking and allowance of said appeal your petitioner is denied the right of bail pending the hearing of the appeal aforesaid, and is therefore deprived of his liberty contrary to article V of the amendments to the Constitution of the United States.

Sixth. Your petitioner is informed and believes that it is contrary both to law and justice that a man should be permitted to appeal under judgment of conviction and be compelled to execute the sentence thereunder, in whole or in part, pending the hearing and determination of said appeal, and that your petitioner is now at Sing Sing prison executing to the State, under the judgment of conviction aforesaid, the very sentence from which he has been permitted to appeal, and all this in violation of article V of the amendments to the Constitution above referred to.

That in most of the States of the Union your petitioner is advised and believes that a defendant convicted of a criminal charge other than murder has the right as a matter of law, upon the granting of an appeal from such conviction, to give bail pending that appeal; that this right is and has been denied him in the
5 case aforesaid by the said State of New York, and this in violation of article IV, section 2, of the Constitution of the United States referred to above and the words of which are there quoted.

That the right of bail is a constitutional right which may not be denied any defendant except by plain and explicit construction of law; that such right is denied this petitioner by implication in

the construction of the constitution of the State of New York, and even if he may not have, under a free and liberal construction of the constitution of said State, the right to give bail under the circumstances aforesaid, still the granting of an appeal to him by said State necessarily includes, as he is informed and believes, the right to give bail pending the hearing and determination of the appeal aforesaid; that this is a well-recognized principle of law in most of the States of the Union, but the same is denied him, and all this in violation of article IV, section 2, of the Constitution of the United States above quoted and the language of which is above set forth.

Wherefore petitioner alleges that the commitment aforesaid and the detention and imprisonment under the conviction and sentence aforesaid and under said indictment are wholly null, void, and of no force or effect, and he prays that this honorable court do forthwith issue the writ of *habeas corpus* to the said F. H. Durston, agent and warden as aforesaid, requiring him to produce the body of John Y. McKane before this court at some time to be designated
6 in said writ, then and there to abide what shall be awarded by said court in the premises.

ROBERT H. GRIFFIN,
Attorney for Petitioner.

Office & P. O. address, 20 Nassau street, New York city.

P. A. CAMPBELL,
THOMAS A. ATCHISON, *Of Counsel.*

STATE OF NEW YORK, }
Southern District of New York, } *ss:*

Robert H. Griffin, being duly sworn, says that he is authorized by the said John Y. McKane, the petitioner, to make the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true to his knowledge, information, and belief.

ROBERT H. GRIFFIN.

Sworn to before me this 15th day of March, 1894.

GUSTAV MEIDT.
[SEAL.] *Notary Public* (117), *N. Y. Co.*

(Endorsed:) U. S. circuit court, southern district of New York. John Y. McKane against F. H. Durston, agent and warden of Sing Sing prison, in the State of New York. Petition for *habeas*
7 *corpus*. Robert H. Griffin, attorney for petitioner; office and post-office address, 20 Nassau St., New York city. P. A. Campbell, Thomas A. Atchison, of counsel. U. S. circuit court. Filed Mar. 15, 1894. John A. Shields, clerk.

No sufficient ground appearing for the allowance of the writ, this application is denied.

March 15, 1894.

E. H. LACOMBE,
U. S. Circuit Judge.

8 At a stated term of the circuit court of the United States for the southern district of New York held in the post-office building, in the city of New York, on the 16th day of March, 1894.

Present: E. Henry Lacombe, judge.

JOHN Y. MCKANE
vs.
F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York.

The petitioner or plaintiff herein having this day in this proceeding or action petitioned this court that it forthwith issue a writ of *habeas corpus* to the above-named F. H. Durston, agent and warden of Sing Sing prison, in the State of New York, requiring him to produce the body of the said John Y. McKane before this court at some time to be designated in said writ, then and there to abide what shall be awarded by this court in the premises, on the ground that his commitment in the said petition mentioned and his detention and imprisonment under the conviction, judgment, sentence, and indictment in the said petition mentioned are wholly null, void, and of no force or effect and in contravention of the provisions of the Constitution of the United States:

9 Now, on reading and filing the said petition and on all the proceedings had herein, after hearing Thomas A. Atchison and Robert H. Griffin, of counsel for said John Y. McKane, in support of said application, and due deliberation having been had and no sufficient ground appearing for the allowance of the writ, it is—

Ordered, adjudged, and decreed that the prayer of the said petition or application for a writ of *habeas corpus* be, and it hereby is, in all things denied.

E. HENRY LACOMBE.

Endorsed: Circuit court of United States. John Y. McKane against F. H. Durston, agent, &c. Original. Order refusing writ of *habeas corpus*. Robert H. Griffin, attorney for petitioner or pl'ff; office and post-office address, 20 Nassau street, New York city. P. T. Campbell, Thomas A. Atchison, of counsel. Due service of copy of the within and of the notice endorsed hereon is this day admitted. Dated New York, —— —, 189–. —— ——, attorney for —. U. S. circuit court. Filed Mar. 16, 1894. John A. Shields, clerk.

10 United States Circuit Court, Southern District of New York.

JOHN Y. MCKANE
vs.
F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York. } Assignment of Errors.

The said John Y. McKane, petitioner, plaintiff, and appellant, makes the following assignment of errors in connection with his petition of appeal from the order, judgment, and decree herein of March 16, dismissing his application and petition:

That the court found, ordered, adjudged, and decreed that no sufficient ground appeared for the allowance of the writ of *habeas corpus* herein or for the granting of the application and petition for the same.

Dated New York, March 16, 1894.

ROBERT H. GRIFFIN,
Attorney for Appellant.

THOMAS A. ATCHISON, *Of Counsel.*

Endorsed: U. S. circuit court, so. dist. N. Y. John Y. McKane *vs.* F. H. Durston, agent, &c. Assignment of errors. Rob't H. Griffin, att'y for appellant, 20 Nassau St., N. Y. city. U. S. circuit court. Filed Mar. 16, 1894. John A. Shields, clerk.

11 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JOHN Y. MCKANE
vs.
F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York. } Bond for Damages and Costs.

Know all men by these presents that we, S. Stryker Williamson and Geritsen Morris, are held and firmly bound unto the above-named F. H. Durston, as agent and warden of Sing Sing prison, in the State of New York, in the sum of two hundred and fifty $\frac{00}{100}$ dollars, to be paid to the said F. H. Durston, as agent and warden of Sing Sing prison, in the State of New York; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the sixteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas the above-named John Y. McKane has prosecuted an appeal to the Supreme Court of the United States to reverse the order, judgment, and decree rendered in the above-entitled suit or proceeding by the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such
12 that if the above-named John Y. McKane shall prosecute said appeal to effect and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

S. STRYKER WILLIAMSON. [SEAL.]
GERRITSEN MORRIS. [SEAL.]

Sealed and delivered and taken and acknowledged this 16th day of March, 1894, before me—

GUSTAV MEIDT.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

S. Stryker Williamson and Geritsen Morris, being duly sworn, doth depose and say and each for himself deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

S. STRYKER WILLIAMSON.
GERRITSEN MORRIS.

Sworn to this 16th day of March, A. D. 1894, before me—
[SEAL.] GUSTAV MEIDT,
Notary Public (117), *N. Y. Co.*

Endorsed: U. S. circuit court, southern district of New York. John Y. McKane against F. H. Durston, agent and warden of Sing Sing prison, in the State of New York. Bond on appeal. Robert H. Griffin, attorney for petitioner or pl'ff; office and post-office address, 20 Nassau street, New York city. Thomas A. Atchi-
13 son, of counsel. Approved by E. Henry Lacombe, circuit judge. Due service of a copy of the within and of the notice endorsed hereon is this day admitted. Dated New York, ——. —— ——, attorney for —. U. S. circuit court. Filed Mar. 16, 1894. John A. Shields, clerk.

14 U. S. Circuit Court for the Southern District of New York.

JOHN Y. MCKANE
against
F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York.

To the honorable the Supreme Court of the United States:

The appeal of John Y. McKane, the petitioner or plaintiff herein, respectfully showeth unto the court—

That on the 15th day of March, 1894, the above-named John Y. McKane filed his petition or application in the circuit court of the United States for the southern district of New York; addressed to the said court, against the above-named F. H. Durston, agent and warden of Sing Sing prison, in the State of New York, praying and petitioning it to forthwith issue the writ of *habeas corpus* to the said F. H. Durston, agent and warden as aforesaid, requiring him to produce the body of the said John Y. McKane before it, the said U. S. circuit court for the southern district of New York, at some time to be designated in said writ, then and there to abide what should be awarded by the said court in the premises, on the ground that the commitment, detention, and imprisonment under the con-
viction, sentence, judgment, and indictment in the said peti-
15 tion mentioned were wholly null, void, and of no force or effect and contrary to the provisions of the Constitution of the United States in such cases made and provided, in this, amongst others, that the said commitment, detention, and imprisonment violated section II of article 4 of the said Constitution and article

V of the articles in addition to and amendment of the said Constitution.

That such proceedings were had in this proceeding, action, or cause that on or about the 16th day of March, 1894, the said U. S. circuit court for the southern district of New York ordered, adjudged, and decreed and made, entered, and filed an order, judgment, and decree in all things denying the application and petition of the said John Y. McKane, for the reason that no sufficient ground appeared for the allowance of the said writ of *habeas corpus* or for the granting of the said application or petition.

That the said John Y. McKane feels aggrieved by such order, judgment, and decree and each and every part thereof, and therefore appeals from each and all of the said provisions of the said order, judgment, and decree and from every part thereof.

That the said John Y. McKane prays that this his appeal may be allowed, and that a transcript of the record, petition, pleadings, and proceedings and evidence in the cause, duly authenticated, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court may proceed to hear the
16 cause anew, and that the provisions of the said order, judgment, and decree of the said circuit court may be reversed or such other order, judgment, or decree made as to the said Supreme Court may seem just, and that the appellee, F. H. Durston, agent and warden of Sing Sing prison, in the State of New York, may be condemned to pay to the appellant his costs and damages.

Dated New York, March 16th, 1894.

ROBERT H. GRIFFIN,
Attorney for Appellant.

Office & P. O. address, 20 Nassau St., N. Y.

THOMAS A. ATCHISON,
P. D. CAMPBELL,
Of Counsel for Appellant.

Appeal allowed. Dated March 16, 1894.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court. John Y. McKane against F. H. Durston, agent, &c. Petition for appeal. Robert H. Griffin, attorney for appellant; office and post-office address, 20 Nassau St., New York city. Thomas A. Atchison, P. D. Campbell, of counsel. U. S. circuit court. Filed Mar. 24, 1894. John A. Shields, clerk.

17 U. S. Circuit Court.

JOHN Y. McKANE
vs.
F. H. DURSTON, Agent, &c.

Service of a copy of the following papers herein is hereby admitted:

(1.) Citation.

(2.) Petition for appeal.
(3.) Certified copy order refusing writ of *habeas corpus*.
(4.) Certified copy bond on appeal.
Dated New York, M'ch 17, 1894.

THEODORE E. HANCOCK,
Attorney General.

18 United States Circuit Court for the Southern District of New York.

JOHN Y. McKANE
against
F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York.
} Affidavit Service on Defendant.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

Schuyler C. Carlton, being duly sworn, says that he is of the age of twenty-one years and upwards; that on the 17th day of March, 1894, at Sing Sing prison, in the city or town of Sing Sing, he served the following papers in this cause on F. H. Durston, agent and warden of Sing Sing prison, in the State of New York—that is to say:

1. The citation;
2. Petition for appeal;
3. Bond on appeal, and,
4. Order refusing writ of *habeas corpus*—

that is to say, by delivering a copy of the citation to such defendant, at the same time exhibiting the original thereof and the judge's signature thereto to him, the said defendant; by delivering a copy of the said petition for appeal to such defendant, at the same time exhibiting to him the original thereof and the signature of the judge to the allowance of the said appeal; by delivering to him, the said defendant, a certified copy of the bond on appeal, together with notice of entry thereof, and by delivering to him, the
19 said defendant, a certified copy of the order refusing writ of *habeas corpus* herein, together with notice of entry thereof—

Deponent leaving each and all of the aforesaid four papers above mentioned with him, the said defendant; and he, deponent, further says that he knew the person so served as aforesaid to be the person mentioned and described in the said citation as the defendant in this cause.

SCHUYLER C. CARLTON.

Sworn to before me this 17th day of March, 1894.

WM. J. HARDING,
[SEAL.] *Notary Public, Kings County, New York.*

Certificate filed in New York county.

(Endorsed:) U. S. circuit court, so. dist. N. Y. John Y. McKane against F. H. Durston, agent, &c. Proof of service. Robert H. Griffin, attorney for pet'r; office and post-office address 20 Nassau

St., New York city. Thos. A. Atkinson, of counsel. U. S. circuit court. Filed Mar. 24, 1894. John A. Shields, clerk.

20 *Citation.*

By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

To F. H. Durston, agent and warden of Sing Sing prison, in the State of New York, Greeting:

Whereas from the whole of the order, judgment, and decree lately made—that is to say, on or about the 16th day of March, 1894—by the circuit court of the United States for the southern district of New York, in a certain cause wherein John Y. McKane was petitioner or plaintiff and F. H. Durston, agent and warden of Sing Sing prison, in the State of New York, was defendant, the said petitioner or plaintiff has appealed to the Supreme Court of the United States, and which said order denied petitioner's or plaintiff's application for a writ of *habeas corpus* to issue to the said F. H. Durston, agent as aforesaid, and has given good and sufficient surety to prosecute said appeal to effect and to answer all costs:

Therefore you are hereby cited and admonished to be and appear before said Supreme Court, at a term thereof to be holden at Washington on the 13 day of April, 1894, pursuant to said appeal, and to show cause, if any there be, why the said order, judgment, and decree so appealed from as aforesaid should not be reversed
21 or such other decree made as to the said Supreme Court may seem just and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. Henry Lacombe, judge of the circuit court of the United States for the southern district of New York, this 16th day of March, 1894.

E. HENRY LACOMBE,
Circuit Judge.

Endorsed: Circuit court of the United States. John Y. McKane against F. H. Durston, agent, &c. Citation. Robert H. Griffin, attorney for petitioner; office and post-office address, 20 Nassau street, New York city. Due service of the within and of the notice endorsed hereon is this day admitted. Dated New York, March 17, 1894. Chas. F. Durston, ag't & warden. U. S. circuit court. Filed Mar. 24, 1894. John A. Shields, clerk.

22 UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from

one to twenty-one, inclusive, contain a true and compiete transcript of the record and proceedings had in said court in the case of John Y. McKane, petitioner & appellant, against F. H. Durston, agent and warden of Sing Sing prison, in the State of New York, respondent and appellee, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixth day of April, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the said United States the one hundred and eighteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 15,569. S. New York C. C. U. S. Term No., 1185. John Y. McKane, appellant, *vs.* F. H. Durston, agent and warden of Sing Sing prison, in the State of New York. Filed April 7, 1894.

1185

Office Supreme Court U. S.
FILED.
APR 9 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

JOHN Y. McKANE

AGAINST

F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York.

You will please take notice, that upon the annexed affidavit of Edward M. Shepard, Deputy Attorney-General of the State of New York, and upon the record herein upon the appeal of the said John Y. McKane to the Supreme Court of the United States, I shall move before the said Supreme Court at the Capitol at the City of Washington, at the opening of the said Court on Monday, the ninth day of April, one thousand eight hundred and ninety-four, or as soon thereafter as counsel can be heard, for an order that this cause be advanced upon the calendar of the Court and that the same be set for argument on the thirteenth day of April inst., with a preference above other causes set for argument on that day, and that the defendant or appellee have such other and further order or relief as may be just.

Dated New York, 6th April, 1894.

THEODORE E. HANCOCK,
Attorney-General
of the State of New York.

EDWARD M. SHEPARD,
Deputy Attorney-General
and of Counsel,
111 Broadway,
New York City,
N. Y.

To ROBERT H. GRIFFIN, ESQ.,
Attorney for John Y. McKane,
No. 20 Nassau Street,
New York City.

5 IN THE SUPREME COURT OF THE UNITED STATES.

JOHN Y. McKANE

AGAINST

F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of
6 New York.

SOUTHERN DISTRICT OF NEW YORK, City and County of New York. } ss.:

EDWARD M. SHEPARD, being duly sworn, says:

I am Deputy Attorney General of the State of New York, and as such have had general charge of the conduct of the prosecution of the said John Y.
7 McKane in the Court of Oyer and Terminer of the State of New York, in which he was convicted of a felony.

An application was, on or about the 15th day of March last, made in behalf of the said John Y. McKane to the Circuit Court of the United States for the Southern District of New York, for a writ of habeas corpus to the said F. H. Durston, Agent and Warden as aforesaid, requiring him to produce the body of the said John Y. McKane before the said Cir-
8 cuit Court at some time to be designated in the said writ, then and there to abide what should be awarded by said Court in the premises. At the time of the said application, the said John Y. McKane was confined in the State Prison at Sing Sing in the State of New York, pursuant to the judgment of conviction duly rendered against him in the said Court of Oyer and Terminer. On the 16th day of March, 1894, an order was duly made by the United States Circuit Court in all things denying the prayer of the said John Y. Mc-

Kane for the said writ of habeas corpus. Thereupon 9
and on the said 16th day of March, 1894, the said John Y. McKane filed an assignment of errors and his petition for leave to appeal to the Supreme Court of the United States, from the said order denying his said application for a writ of habeas corpus, which appeal was allowed by the said Circuit Court on the 16th day of March, 1894. On the same day the said John Y. McKane filed his bond on appeal for costs, and secured the allowance and approval thereof by the said Circuit Court, whereupon and on the 10
same day, a citation on appeal to this Court was duly issued herein directed to the said Durston. The Clerk of the said Circuit Court has duly transmitted to this Court the record of the proceedings aforesaid in the said Circuit Court, and the said appeal is now before this Court. I have duly appeared in this Court for the defendant and appellee.

This case is a criminal case. It is a case of general public interest and of great consequence to the administration of criminal justice in the State of New 11
York and to the orderly procedure of the courts, both federal and state, within that state. Upon the basis of the said appeal so pending in this Court, the said John Y. McKane has made further application to the said Circuit Court for a writ of habeas corpus directed to the said Durston and requiring him to produce the body of the said John Y. McKane before the said Circuit Court; and the said John Y. McKane, in his said petition for the said writ, claims that pending his said appeal to this Court from the denial of his first appli- 12
cation for a writ of habeas corpus, his commitment to the said State Prison and his detention and imprisonment there under his conviction and the sentence imposed upon him by the said Court of Oyer and Terminer, and the enforcement of the execution of the said judgment of conviction are and each of them is null, void and of no force or effect.

The said John Y. McKane as such appellant has not, as I am informed and believe, provided the

means of printing the record in this case or taken steps to docket his said appeal in this Court; and in my opinion it is his intention, or the intention of those acting for him, that the appeal in this Court shall be delayed, in order to facilitate the application for a writ of habeas corpus, which application is possible only during the pendency of this appeal.

The proposition of law asserted by the said John Y. McKane upon the present appeal is, as I understand it, that imprisonment of a person convicted in the State of New York of crime pursuant to the judgment and sentence follow- ing such conviction is unlawful and void if at the time an appeal from such judgment and sentence shall be pending. If that proposition be correct, the result to the administration of criminal justice in the State of New York will, in my opinion, be momentous and incalculably disastrous. If the position of the appellant be correct, a like application can be made for the very large number of prisoners confined in the state prisons, penitentiaries and county jails of the State of New York, who have taken appeals. It concerns the highest welfare of the State of New York that this question shall not remain open longer than is absolutely necessary for its due consideration by this Court, and that, if the contention of the appellant is to prevail, there shall be an immediate opportunity afforded to the Legislature of the State of New York and Congress of the United States to modify the laws which make such a result possible. The Legislature of the State of New York is at present in session; and as I am informed and believe, it will probably adjourn within the period of about three weeks or four weeks. The Congress of the United States is also in session; and if any change of a federal statute is by the decision of this Court, to be made necessary to the public welfare it is, in my opinion, of the highest consequence to the secure and orderly administration of the law, not only in the State of New York but elsewhere in the United States,

that the opinion of this Court shall be pronounced before the adjournment of its present session and in time for amendment of the statutes, if such amendment shall by such decision be found necessary. 17

EDWARD M. SHEPARD.

Sworn to before me this 6th day of April, 1894.

JNO. M. PERRY,
[SEAL.] Notary Public,
Kings Co.

Cert. filed in N. Y. Co. 18

19

20

Office Supreme Court, U. S.
FILED.
APR 12 1894
JAMES H. McKENNEY,
CLERK.

EVENING POST JOB PRINTING HOUSE, N. Y.

IN THE

Supreme Court of the United States.

JOHN Y. McKANE,
Appellant,

vs.

F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York,
Respondent.

No. 1185.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO ADVANCE CAUSE.

Statement.

February 19, 1894, the appellant, "upon an indictment charging him with willfully violating a provision of the election law relative to the registration of electors," was by a Court of Oyer and Terminer of Kings County, State of New York, sentenced and adjudged to "be imprisoned in the State Prison at Sing Sing at hard labor for the term of six years."

From that judgment he was allowed and took an appeal, notwithstanding which he was and is "by operation of law" denied in New York the right to bail on appeal.

Upon presentation of these facts to the United States Circuit Court, Southern District of New York, by petition for a writ of *habeas corpus*, that Court refused to issue it, whereupon this appeal was taken and perfected, the citation being returnable April 13, and the appellant appearing here by his counsel April 9.

In the meantime, and on three occasions, appellant applied to the Supreme Court of New York for a writ of *habeas corpus*—in his petition setting forth the appeal here pending—and claiming that by virtue of § 766 of the United States Revised Statutes the execution of the judgment by the State was stayed. On each occasion, in the face of the United States statute, and although in New York the granting of the writ is mandatory, the Court refused to issue it.

Thereupon, and upon March 31st, this appellant notified this appellee, the District Attorney of Kings County and the Attorney-General of the State of New York, that on April 6th he would apply to the United States Circuit Court, Southern District of New York, for a writ of *habeas corpus*, on the ground of the State's violation and disregard of § 766 of the United States Revised Statutes. On that application both sides were heard, and it remains yet undetermined.

April 6th (Friday) at 8 P. M., Robert H. Griffin, who three days subsequently appeared herein for appellant, was served with notice of this motion. The appellant was not personally served.

We respectfully call the attention of the Court to the following paragraphs in the affidavit on which this motion is based:

"The Legislature of the State of New York is at present in session; and, as I am informed and believe, it will probably adjourn within the period of about three or four weeks. The Congress of the United States is also in session, and if any change of a Federal Statute is, by the decision of this Court,

to be made necessary to the public welfare, it is, in my opinion, of the highest consequence to the secure and orderly administration of the law, not only in the State of New York but elsewhere in the United States, that the opinion of this Court should be pronounced before the adjournment of its present session and in time for amendment of the Statutes, if such amendment shall by such decision be found necessary."

Edward M. Shepard's Affidavit, concluding paragraphs, page 2.

From which it doth appear: 1st. That the representative of New York State assumes that this Court could render a decision endangering the public welfare and the "orderly administration of the law."

2d. That a change of the Federal and State Laws may be necessary to the maintenance of his position.

3d. That he has sufficient power to get the Congress of the United States to pass the law he desires to be enacted; and

4th. That the Legislature of the State of New York will do his bidding.

The demands of our opponent are modest in the extreme. All he asks is that this Honorable Court, setting aside all other business, shall not only hear but determine this case on the return day of the citation. That the Congress of the United States, laying aside all other business, shall legislate in his favor; that the Legislature of the State of New York do likewise—and all of this—to the end that a six-year convict be compelled to execute his sentence in part, pending his appeal to a higher Court of his State, and pending an appeal to this Court, upon a refusal of the

United States Circuit Court to issue a writ of *habeas corpus*, and that the State of New York may be permitted without consequences to violate Section 766 of the Revised Statutes of the United States.

We respectfully submit further, that this case is not before the Court until the return day of the citation on appeal, to wit, April 13, 1894, and until such day no motion of any kind can be properly made.

POINTS AND ARGUMENT.

FIRST.—General public interest does not demand an advancement of this cause.

By none of his applications has appellant sought to divert the writ of *habeas corpus* from its general purpose, to serve as an appeal or a writ of error. He seeks no review of the action of the trial Court. He merely claims his constitutional right to be admitted to bail on appeal; the enforcement by the Federal Courts of § 766 of the Revised Statutes, which the State Court refuses to recognize.

Rather does "Public Interest" demand the enforcement of that section. It is a beneficent and humane provision of law, and may have been passed in contemplation of the very circumstances here presented. It is in line with the liberality of the Federal statutes, which always allow bail, *even in capital cases.*

U. S. Rev. Stat., §§ 1014–1017.

SECOND.—This is not a criminal case.

If the writ of *habeas corpus* was sought to be used as an appeal or writ of error, it might be so held. But nothing of the kind is here attempted.

THIRD.—The notice of motion was insufficient.

The only service made in this cause was on April 6th, at 8 P. M., on Robert H. Griffin, who, until then, was unaware of the urgency existing for his appearance, and who, thereupon, in the morning of April 7th, mailed notice of appearance to the Clerk of this Court, by whom it was received April 9th.

See Court Records.

If the converse of Hurley *vs.* Jones, 7 Otto, 318, holds, this service was insufficient.

FOURTH.—The motion should be denied.

The Federal Courts and Statutes favor the admission to bail—the enforcement of § 766. The United States Circuit Court has not yet passed on appellant's second application for a writ of *habeas corpus.*

Dated New York, April 10, 1894.

Respectfully submitted,

THOMAS A. ATCHISON,
ROBERT H. GRIFFIN,
Of Counsel for Appellant.

FILED.
APR 27 1894
JAMES H. McKENNEY,
CLERK.

EVENING POST JOB PRINTING HOUSE—N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1893.

No. 1,185.

JOHN Y. McKANE,
Appellant,

vs.

F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York,
Appellee.

Brief for Appellant.

This is an appeal from the final decision of the Circuit Court of the United States for the Southern District of New York, made on March 16, 1894, denying appellant's application for a writ of *habeas corpus*. After the taking of this appeal, that is to say, on or about April 6, 1894, appellant's counsel were served with notice of motion to advance this cause on the calendar of this Court by Edward M. Shephard, Deputy Attorney-General of the State of New York. In his motion papers he stated that this appeal was the basis of a further application for a writ of *habeas corpus* before the United States

Circuit Court for the Southern District of New York.

See affidavit on motion to advance, p. 3, fol. 11.

Appellant's counsel in their brief in opposition to said motion, and in answer thereto, stated that application had been made for a further writ of *habeas corpus*, and that the ground for said application was the willful violation by the State of New York and the Warden of Sing Sing Prison of § 766 of the Revised Statutes of the United States.

Brief for Appellant on motion to advance, pages 1 and 2.

Said application has since been denied. Counsel for appellee admits in his motion papers and his brief on this appeal that the appellant, John Y. McKane, is now and has at all times since the granting of this appeal been kept at Sing Sing Prison in the execution of his sentence at hard labor.

Thus is the question fairly presented to this Honorable Court, raised by counsel for appellee, as to whether or not the continued execution of this sentence against this appellant, after the perfecting of his appeal to this Honorable Court, is or is not a violation or Section 766 of the United States Revised Statutes.

The above section reads:

Section 766: Pending proceedings; action by the State authority void.

"Pending any proceedings on appeal in the cases mentioned in the three preceding sections, and until final judgment therein, * * * any proceedings against the person so imprisoned or confined or restrained of his liberty in any State court, or by or under the authority of any State, for any matter so heard and determined or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void."

In construing this section the Supreme

Court of the United States has said: "Of the object of this statute there can be no doubt. * * * It was in cases where the applicant was held in custody, under the authority of a State court or by the authority of a State * * * to stay the hands of such a court or State, while the question as to whether his detention was in violation of the Constitution, laws, or treaties of the United States was being examined by the courts of the Union having jurisdiction in the premises. But the jurisdiction of the said courts in the cases specified is restrained only pending the proceedings in the courts of the United States, and until final judgment therein."

In re Jugiro, 140 U. S., 291, 295.

There are various prisons in the State of New York where prisoners may be detained, awaiting trial or pending an appeal, where a stay of proceedings has been granted; but Sing Sing is a State's prison, where convicts cannot legally be held except in the execution of sentence.

New York Session Laws, 1825, Chapter 25; 2 Birdseye's Revised Statutes of New York, page 2304; New York Penal Code, Section 704:

Where a person convicted of crime shall have begun the execution of his sentence and shall thereafter procure a stay from the State courts, the law of New York provides that he shall be returned to the original custody in which he was, which in this case would be to the Sheriff of Kings County, New York.

See N. Y. Code of Criminal Procedure, Section 531.

But in the case at bar, the State authorities refused to recognize any stay by operation of Federal law, and have kept appellant at Sing Sing at hard labor.

We submit that this appellee in retaining this appellant at Sing Sing and in executing the sentence

of hard labor upon him, is in daily and hourly violation of the United States law, and that he cannot be heard upon this appeal until he shall have first conformed to the law as laid down by this Honorable Court. We submit, that the question of the violation of Section 766, U. S. Rev. Statutes, is as clearly before this Court as it could be if presented directly here by *habeas corpus*.

We submit further, that the Court below erred in refusing to grant the writ prayed for by this appellant, and urge:

(1st.) That the commitment set forth in the petition for *habeas corpus* is void for uncertainty—it naming no date when sentence shall begin or end (Record, p. 1, fol. 2). That he is, therefore, deprived of his liberty without due process of law within the meaning of Article V. of the Amendments to the Constitution of the United States.

(2d.) That right of bail pending an appeal from a judgment of conviction is a privilege and an immunity enjoyed by the citizens of many States, and denied to this appellant, in violation of Section II., Article IV., of said Constitution.

(3d.) That to compel a man to execute his sentence after granting him an appeal and pending that appeal, is a logical absurdity and a cruel punishment, and in violation of Article VIII. of said Constitution.

(4th.) That the Court below erred in refusing appellant the writ of *habeas corpus* prayed for, inasmuch as his petition alleged violations of the Constitution and laws of the United States.

Ex parte Royall, 117 U. S., 241, 250.
Ex parte Neagle, 135 U. S., 41.
Ex parte Conway, 48 Federal, 77.
In re Jordan, 49 Fed., 238, 240.
Ex parte Farley, 40 Fed., 66, 71.
In re Speckler, 43 Fed., 653, 661.

(5th.) The order appealed from should be reversed.

Dated New York, April 27, 1894.

Respectfully submitted.

THOMAS A. ATCHISON,
ROBERT H. GRIFFIN,
Of Counsel.

Office Supreme Court, U. S.
FILED.
APR 23 1894
JAMES H. McKENNEY,
CLERK.

153-684

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1893.

No. 1185.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN Y. McKANE,

Appellant,

vs.

F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York,

Appellee.

BRIEF FOR APPELLEE.

BENJAMIN F. TRACY,
EDWARD M. SHEPARD,
Of Counsel for Appellee.

LIVINGSTON MIDDLEDITCH CO., Printers, 149–153 Leonard St., N. Y.

In the Supreme Court of the United States,

OCTOBER TERM, 1893,

No. 1,185.

JOHN Y. MCKANE,
Appellant,

vs.

F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York,
Appellee.

Brief for Appellee.

Statement of the Case.

The appeal is taken from the final decision of the Circuit Court of the United States for the Southern District of New York, made on 16th March, 1894 (fols. 8, 9), by which it was ordered that the appellant's application for a writ of habeas corpus be denied.

Facts.

The application so denied was made in the Court below by petition, on 15th March, 1894 (fols. 1–6). In this petition the appellant stated :

1. That on 19th February, 1894, a judgment of conviction was rendered against him in a court of oyer

and terminer, of the State of New York, upon an indictment for felony, charging him with wilful violation of a provision of the election law relative to the registration of electors; that upon such conviction the appellant was by such judgment sentenced to imprisonment in the state prison at Sing Sing at hard labor for the term of six years.

2. That upon such judgment of conviction the Court of Oyer and Terminer made an order requiring the Sheriff of the County of Kings to take the body of the appellant to the state prison, and that "thereupon and thereafter and by virtue thereof," that is to say, by virtue of the judgment of conviction and the order made thereon, the appellant was taken to such state prison and therein imprisoned by the appellee, and that he now remains imprisoned by the appellee, under the said judgment of conviction and order.

3. That the judgment of conviction and the order "are absolutely void." wherefore and whereby the appellant states that he is deprived of his liberty without due process of law, as mentioned in article V. of the amendments to the constitution of the United States.

Note: No fact is alleged which is claimed to tend to show that the Court of Oyer and Terminer in New York did not have full jurisdiction to find and try the indictment and full jurisdiction of the person of the appellant, or that there was anything done upon the trial or included in the judgment which was not strictly within the jurisdiction of the court.

4. That, after the rendition of the judgment of conviction and the order made thereon, the appellant, being denied the right of bail, was conveyed to the state prison, where he now is, wherefore and whereby the

appellant states that his commitment and the judgment, sentence and order aforesaid are void under the federal constitution.

Note: No fact was stated which is claimed to tend to show the voidness of either the commitment, judgment, sentence or order, except only the denial to the appellant of the right of bail.

5. That the appellant had duly appealed to the General Term of the Supreme Court of New York from the judgment against him; that the appeal is now pending; but that, notwithstanding the appeal, the appellee continues to confine the appellant in the state prison at hard labor, and that the appellant is denied the right of bail pending the hearing of his appeal, which denial the appellant declares to be in violation of article V. of the amendments to the federal constitution.

Note: Here, again, no fact is stated which is claimed to tend to show a violation of the constitution, except only that, pending his appeal, the appellant is denied what he calls his "right of bail."

6. That "it is contrary both to law and justice that "a man should be permitted to appeal from a judg- "ment of conviction and be compelled to execute the "sentence thereunder in whole or in part pending the "hearing and determination of said appeal:" that "in "most of the States a defendant convicted of a crimi- "nal charge other than murder has the right as a mat- "ter of l[illegible] upon the granting of an appeal from such "conviction to give bail;" and that the denial to the appellant of this right is in violation of section 2 of article IV. of the federal constitution.

Note: No fact is alleged to sustain this expression of opinion on a question of law.

Decision below.

Upon this petition the Court below denied the application for a writ of habeas corpus, deciding that "no "sufficient ground" appeared for the allowance of the writ (fol. 79).

ARGUMENT.

First.

The petition for the writ of habeas corpus set out no fact which is claimed to tend to show that the court of New York in which the appellant was convicted did not have complete jurisdiction to find the indictment, and to try the appellant thereon, or that any error, jurisdictional or otherwise, was committed by that court.

In the brief submitted by the counsel for the appellant in opposition to the motion of the appellee to advance this cause they said:

"By none of his applications has appellant sought to divert the writ of habeas corpus from its general purpose to serve as an appeal or a writ of error. *He seeks no review of the action of the trial court.* He merely claims his constitutional right to be admitted to bail on appeal."

This Court has frequently decided that the writ of habeas corpus should not be issued to review the judgment of a court of competent jurisdiction.

Ex parte Watkins, 3 Peters, 193, per Marshall, *C. J.* (p. 202):

"This writ, as has been said, is in the nature of a writ of error, which brings up the body of the prisoner with the cause of commitment. The Court can un-

doubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this Court, is not that judgment in itself sufficient cause? * * * The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this Court would be. It is as conclusive on this Court as it is on other courts."

Ex parte Parks, 93 U. S., 18, per BRADLEY, *J.* (p. 22):

"These extracts are sufficient to show that, when a person is convict or in execution by legal process issued by a court of competent jurisdiction, no relief can be had. * * * In a case like the present, where a prisoner is in execution upon a conviction, the writ ought not be issued, or, if issued, the prisoner should at once be remanded, if the Court below had jurisdiction of the offence, and did not act beyond the powers conferred upon it.

Ex parte Siebold, 100 U. S., 371, per BRADLEY, *J.* (p. 375):

"But the general rule is that the conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by habeas corpus. The only ground on which this Court or any court without some special statute authorizing it will give relief on habeas corpus to a prisoner under conviction and sentence of another Court is the want of jurisdiction in such Court over the person or the cause or some other matter rendering its proceedings void."

Re Jugiro, 140 U. S., 291, per Harlan, *J.* (p. 296):

"Nothing but an entire want of jurisdiction in the State Court to make the order of December 1, 1890, could have justified the Circuit Court in interfering with its proceedings by writ of habeas corpus."

Second.

The appellant has no right under the constitution of the United States to a stay of proceedings pending his appeal from the judgment of the Court of Oyer and Terminer to the General Term of the Supreme Court of New York.

1. Neither the constitution of the United States nor the constitution of the State of New York has given to any citizen of New York convicted of crime any right to appeal. In England there was no right of appeal from a conviction for crime. In the federal courts there was until recently no such right of appeal. The right of appeal in New York is no more than a right under its Code of Criminal Procedure, which is merely a statute subject to the will of the legislature of the state.

2. It is not for the appellant to complain that, while he is held in execution of the sentence imposed upon him by the judgment of conviction, the law permits him, if he please, to appeal. He is not bound to appeal. As the Legislature of the state was under no requirement to grant him a right of appeal, he suffers no diminution of any right of his because, in granting him the right of appeal the state did not also grant him a right to a stay of proceedings. The greater includes the less. If the state could altogether refuse an appeal and stay, it could surely grant the appeal and refuse the stay.

3. The appellant having been duly convicted in the state of New York by a court of competent jurisdiction is entitled to such stay of proceedings only as may be given by the laws of New York. The only provision for a stay of proceedings on appeal from the Court of Oyer and Terminer to the Supreme Court of

New York is contained in Section 527 of the Code of Criminal Procedure, as follows :

" An appeal to the Supreme Court from a judgment of conviction, or other determination from which an appeal can be taken, stays the execution of the judgment or determination upon filing with the notice of appeal a certificate of the judge who presided at the trial, or of a justice of the supreme court, that in his opinion there is reasonable doubt whether the judgment should stand, *but not otherwise.*"

The appellant having failed to secure the certificate of reasonable doubt, had no right to a stay.

4. The attorney for the appellant was mistaken in his statement (petition, fol. 4) " that in most of the " states of the Union * * * a defendant convicted " of a criminal charge other than murder, has the " right as a matter of law upon the granting of appeal " upon such conviction to give bail pending that " appeal."

(*a.*) In the following five states we do not find that there is any absolute right to an appeal from a judgment of conviction for a felony :

Arkansas Dig. of R. S., §§2445, 2450.
New Hampshire Public Statutes (1891), chap. 248, §§2–4; chap. 252, §2; see also *Id.*, chap. 20, § 4; Buzzell *v.* State, 59 N. H., 61; State *v.* Prescott, 7 N. H., 287.
Virginia, Matthew's Crim. Dig., § 4056.
West Virginia, Code (1891), chap. 135, §§1, 10, 11.
Wyoming, R. S. (1887), § 3354.

(*b.*) In the following twenty-two states an appeal from a conviction does not act as a stay, except upon a certificate from a court or judge of reasonable cause for the appeal or reasonable doubt of guilt, or upon an

express order for a stay, the granting of which rests in the discretion of the court:

California, Penal Code, §§1243–1245.
Colorado, Mills's Statutes, §1479.
Delaware, Revised Code (Ed. 1893), p. 981, Chap. 133, §28.
Idaho, R. S. (1887), §§8048, 8049.
Illinois, Hurd's R. S. (1891), §§461, 462.
Maine, R. S., chap. 102, §12.
Massachusetts, Public Statutes, chap. 187, §§1, 11.
Michigan, Howell's Statutes, chap. 300, §§8678, 8684.
Minnesota, Kelly's Statutes, §§6861, 6862, 6864.
Missouri, R. S. (1889) §4282.
Montana, Compiled Statutes (1887), Crim. Practice Act, §§400, 242,
Nevada, General Statutes (1885), paragraphs 4359, 4380, Crim. Procedure Act, §§479, 500.
New York, Code of Crim. Proc., §527.
North Dakota, Compiled Laws (1887), §§7506, 7507.
Oregon, Hill's Laws (1892), §1440.
Pennsylvania, Shields's Penal Code (1884), Vol. 2, p. 682.
South Dakota, Compiled Laws (1887), §§7506, 7507.
Tennessee, Code (1884), §§5978, 6090; Holcomb *v.* State, 6 Lea, 668.
Vermont, R. L. (1880), §1699.
Virginia, Matthew's Crim. Dig., §4056.
West Virginia, Code (1891), chap. 135, §§4, 12.
Wisconsin, Sanborn & Berryman's Statutes, §4724.

(c.) The only States in which we find any apparent warrant for the claim that a person convicted of a felony is absolutely entitled to a stay are the following:

Alabama, Crim. Code (1886), §4511.
Connecticut, General Statutes (1888), §§1635, 1636.
Florida, R. S. (1891), §2974.
Georgia, Code, §4263.
Iowa, McClain's R. S. (1888), §§ 5488, 5896.
Kansas, General Statutes (1889), paragraph 5349; Code Crim. Proc., §287.
Kentucky, Criminal Code (1888), §336.
Louisiana, Voorhies R. L., §1003.
Maryland, Public General Laws (1888), vol. 2, §77.
Mississippi, Thompson, Dillard & Campbell's Annotated Code, §61.
Nebraska, Criminal Code, §510.
New Jersey, Supplement to R. S. (1877 to 1886), p. 211, §17.
North Carolina, Laws of 1887, chap. 191.
Rhode Island, Public Statutes (1882), chap. 219, §§2-4; chap. 220, §19.
South Carolina, Laws of 1884, Act No. 454 (p. 737).
Texas, Willson's Crim. Statutes, vol. 2 (Code Crim. Proc.), §2645.
Washington, Laws of 1893, chap. 61, §§30, 31.
Wyoming, R. S. (1887), §3356.

But in four of those States, the convicted felon, though entitled to the stay, is by an express provision of the statutes kept in custody.

Kentucky, Crim. Code (1888), §75.
Louisiana, Voorhies R. L., § 1003.
South Carolina, Laws of 1887, Act No. 380 (p. 786).

Texas, Willson's Crim. Statutes, Vol. 2 (Code Crim. Proc.), §2635.

In three of them it is plainly to be inferred from the statutes that the convict cannot be bailed :

Alabama, Criminal Code (1886) §§4512, 4519, 4520.
North Carolina, Code (1883), vol. 1, §§1181, 1232.
Wyoming, R. S. (1887), §§3356–3360.

And in ~~the others,~~ others probably ~~in~~ most of them, the courts have a discretion whether or not to admit to bail.

Florida, R. S. (1891), §2976.
Maryland, Public General Laws (1888), §77.
Mississippi, Thompson, Dillard & Campbell's Annotated Code, §66.

(*d*) The following States cannot conveniently be classified under any of the above headings :

Indiana. Here there is an absolute right to an appeal, but no provision is made for a stay thereon. Myers & Co.'s R. S. (1888), vol. 1, §1888.

Ohio. Here there is an absolute right to a stay on appeal to the Supreme Court, but not on appeal to the inferior courts, although felony cases may be appealed to such inferior courts, and admission to bail is discretionary in all courts (R. S., 1894, §7362.)

5. By section 555 of the Code of Criminal Procedure of New York (which requires, as has been stated, a certificate of reasonable doubt as a *sine qua non* of any stay) it is provided that

"After the conviction for a crime not punishable with death, a defendant who has appealed, and when

there is a stay of proceedings, *and not otherwise*, may be admitted to bail: 1. As a matter of right, when the appeal is from a judgment imposing a fine only; 2. As a matter of *discretion* in all other cases."

In *Clawson* v. *United States*, 113 U. S., 143, this Court dealt with a provision in the laws of one of the territories, similar to this. The appellant, in that case, was convicted of polygamy in the district court of the third judicial district of Utah. He appealed to the supreme court of the territory; the trial judge gave a certificate of reaonable doubt; and his appeal was perfected. He then appealed to the court in which he was sentenced to be discharged on bail pending appeal. His application was denied; and he sued out a writ of habeas corpus in the superme court of the territory. Upon the return of the writ his application for bail was denied and he was remanded. He then appealed to this Court. The counsel for the prisoner, Messrs. McVeagh and F. S. Richards, strenuously argued that, after the certificate of reasonable doubt had been granted the prisoner, he was entitled as a matter of right to be admitted to bail. This Court, however, affirmed the order of the Supreme Court of Utah remanding the prisoner and said, per HARLAN, *J.* (p. 147):

"There is nothing before us for review except the order of the supreme court of the territory, which discloses nothing more than the denial of the application to it for bail and the remanding of the prisoner to the custody of the marshal. That order, in connection with the petition for habeas corpus, assuming all the allegations of fact contained in it to be true, only raises the question whether under the laws of the territory the accused, upon perfecting his appeal and filing the required certificate of probable cause, was entitled as matter of right and without further showing to be let to bail pending his appeal from the judgment of con-

viction. * * * As the judgment did not impose upon the appellant a fine only his admission to bail pending the appeal from that judgment was not a matter of right, but was distinctly committed by the statute to the discretion of the Court or judge to whom the application for bail may be made. * * * We do not mean to say that the granting of such a certificate is not a fact entitled to weight in the determination of an application for bail, but only that the statute does not make it so far conclusive of the question of bail as to prevent the Court from considering every circumcumstance which should fairly and reasonably control or affect its discretion."

6. The appellant is not helped by section 2 of article IV. of the federal constitution. Among the privileges and immunities to which the citizens of each state are entitled there is not included any right to be let to bail after conviction and sentence to imprisonment. It does not appear that the applicant John Y. McKane was not a citizen of the state of New York. Nor does it appear that in the matter of admitting to bail after conviction or in any other matter of criminal procedure the laws of the state of New York have undertaken to grant to any of its citizens any privilege or immunity not granted to citizens of all other states. On the contrary, the provisions of the Code of Criminal Procedure of New York are perfectly general, applying to all persons, whether citizens of New York or citizens of other states or aliens.

7. If it be true that any of the States other than New York give a convict pending his appeal an absolute right to be let to bail, still that fact gives no right to a convict in a State not enacting such laws.

Paul v. *Virginia*, 8 Wallace, 168, per Field, J. (p. 180):

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the

advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states. * * * Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other states, and giving them equality of privilege with citizens of those states, the Republic would have constituted little more than a league of States, it would not have constituted the Union which now exists. But the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under the constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision.

It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation except by the permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given."

Corfield v. *Coryell*, 4 Wash. C. C., 371, per Washington, J. (p. 380):

"The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign."

This Court has (*McCready* v. *Virginia*, *infra*) adopted part, though not all, of the definition in *Corfield* v. *Coryell*.

In the *Dred Scott* case, 19 How., 580, Mr. Justice Curtis described the privileges and immunities protected by the constitution as being such "as belong to general citizenship."

Conner v. *Elliott*, 18 How., 591, per Curtis, *J.*, (p. 593):

"It is sufficient for this case to say that according to the express words and clear meaning of this clause no privileges are secured by it except those which belong to citizenship. Rights attached by the law to contracts, by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed 'privileges of a citizen' within the meaning of the constitution. * * * If a law of Louisiana were to give to the parties *inter sese* certain peculiar rights provided they should reside within the state, and to carry on the partnership trade there, we think it could not be maintained that all copartners, citizens of the United States, residing and doing business elsewhere, must have those peculiar rights by force of the constitution of the United States any more than it could be maintained that, because a law of Louisiana gives certain damages on protested bills of exchange, drawn or endorsed within that state, the same damages must be recoverable on bills drawn elsewhere in favor of citizens of the United States."

McCready v. *Virginia*, 94 U. S., 391: In this case a citizen of Maryland claimed the right to plant oysters in Ware River, a stream of Virginia, where the tide ebbed and flowed, and where the citizens of Virginia had that right. The Court said, per WAITE, *C. J.* (p. 395):

"If Virginia had by law provided for the sale of its once vast public domain and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture could the citizens of other states avail themselves of such a privilege. And the reason is obvious: The right thus granted is not a privilege or immunity of general but of special citizenship. It does not 'belong of right to the citizens of all free governments,' but only to the citizens of Virginia."

Vide also Kimmish v. Ball 129 U.S. 217, 222, per Field J.

To these authorities may be added the following passage from Cooley's Constitutional Limitations, 5th Ed., p. 491 :

"Although the precise meaning of 'privileges and immunities' is not very conclusively settled as yet" (1883) "it appears to be conceded that the constitution secures in each state to the citizens of all other states the right to remove to, and carry on business therein ; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts, and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property or person of citizens of the same state are not subject to. To this extent, at least, discriminations could not be made by state laws against them. But it is unquestionable that many other rights and privileges may be made—as they usually are—to depend upon actual residence ; such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the state, and the like."

8. The authorities just cited clearly enough show the limit of significance of the expression "privileges and immunities," even where a state treats citizens of other states differently from its own. But, as has already been pointed out, the laws of the state of New York make no distinction whatever in the administration of its laws as to crime between its own citizens and citizens of other states, or even aliens. A citizen of New York, convicted of, or charged with, a crime within its borders, has no privilege or immunity different from that of a citizen of another state or an alien. It would seem to be difficult seriously to argue the proposition implied in the contention of the appellant that the grant by one state or by many states of privileges or rights in criminal or civil procedure gives to a citizen of another state the right to import into that state for his benefit such grant by other states.

9. Subdivision 1 of section 2 of article IV., of the federal constitution does not cause the laws of one state to affect the person or property of citizens of another state while in the latter state. It only secures in any state an equality on the part of citizens of another state with the citizens of the first state. It makes the citizens of the several states citizens of one common country. It was not designed to interfere with the jurisdiction which each state has over the person and property of its own citizens. It was not designed to incorporate into the laws of one state, against its will, the peculiar laws of another state. Yet this is the appellant's contention.

Third.

The order should be affirmed.

Dated New York, 19th April, 1894.

BENJAMIN F. TRACY,
EDWARD M. SHEPARD,
of Counsel for the Appellee.